Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCvC-279–06 OF 2014
QUAY CHEW SOON JC
15 JANUARY 2021

Contract — Agreement — Sale and purchase agreement — Sale and purchase agreement ('SPA') was entered into between plaintiff and first defendant in relation to purchase of land — Plaintiff terminated SPA with first defendant — Plaintiff requested refund for deposit but no refund made by first defendant — First defendant requested payment of RM6,093,292 from plaintiff failure to pay caused termination of SPA by first defendant — Whether there was misrepresentation by defendants against plaintiff — Whether second defendant was holding deposit as stakeholder until first defendant had entered into back to back SPA with landowners — Whether there was conspiracy to defraud and injured plaintiff by unlawful means as against all defendant — Whether there was breach of fiduciary duty breach of trust and negligence as against first, second and third defendants — Whether there was dishonest assistance in breach of trust and fiduciary duty by second and third defendant as a constructive trustee as against fourth defendant

The present suit concerned on the plaintiff's unsuccessful purchase of a land in Old Klang Road held under Geran 4503, Lot 3910, Mukim Kuala Lumpur measuring approximately 60,321.48 metres ('the land'). The registered proprietors of the land were Low Hock Key and Low Hock Tuck ('the first owner') who owned 1/2 undivided share, Lim Tiong Tian ('the second owner'), Lim Cheong Leong ('the third owner') and Hong Kong & Shanghai Bank (M) Trustee Bhd who owned 1/6 undivided shares respectively. The plaintiff had come to know about the land from the third defendant. At that time, the third defendant was acting for the first owner. The third defendant had introduced the land to PW3. Thereafter, PW2 was interested in purchasing the land. Initially, the plan was to purchase the land through a company named PeakVille Development Sdn Bhd ('PeakVille'). However, PeakVille informed the second defendant by way of a letter that the purchaser of the land would not be PeakVille but the plaintiff instead. In that letter, PeakVille notified the second defendant that all payments made as earnest deposit towards the purchase of the land would be regarded as payment made by the plaintiff. A sale and purchase agreement ('the SPA') was entered into between the plaintiff and the first defendant in relation to purchase of the land ('the transaction'). At a meeting on 19 June 2012, PW2 informed the third defendant that the plaintiff did not wish to proceed with the transaction as the issues with the landowners had yet to be settled. Thereafter, the plaintiff terminated the SPA vide its letter

dated 19 July 2012. A settlement was entered into between the plaintiff and the first defendant in the settlement agreement. Pursuant to the settlement agreement, the plaintiff requested the first defendant to refund the deposit within one month, failing which the plaintiff would be allowed to withdraw its earlier termination of the SPA and assigned its rights under the SPA to an unrelated third party. No refund made by the first defendant and the SPA was treated to be revived. The first defendant demanded payment of a sum of RM6,093,252 within seven days pursuant to cl 2.1(i) of the SPA. In a letter dated 24 August 2013 to the second defendant, AJC confirmed that the plaintiff's earlier termination of the SPA was now withdrawn and that the plaintiff would assign its rights and interests in the SPA to an unrelated third party nominated by it. The nominated third party was a company named Utusan Mewah Sdn Bhd ('the new purchaser'). PW3 said that the first defendant's demand of RM6,093,252 must be negotiated with the new purchaser. As the plaintiff failed to pay the sum of RM6,093,252, the first defendant terminated the SPA vide a notice of termination dated 21 October 2013 to the plaintiff. The plaintiff's pleaded causes of action were: (a) the conspiracy to defraud and injured the plaintiff by unlawful means as against all the defendant; (b) the breach of fiduciary duty, breach of trust and negligence as against the first, second and third defendants; and (c) the dishonest assistance in the breach of trust and fiduciary duty by the second and third defendant as a constructive trustee as against the fourth defendant. For there to be fraud as alleged by the plaintiff, the main issues to be determined were: (i) whether there was any misrepresentation by the defendants that the landowners had entered into back to back SPA with the first defendant; and (ii) whether the second defendant was holding the deposit as stakeholder until the first defendant had entered into back to back SPA with the landowners.

Held, dismissing the plaintiff's action:

(1) The defendant did not make any misrepresentation to the plaintiff that the landowners had entered into back to back SPA with the first defendant. It was not proven on a balance of probabilities that the defendants committed fraud against the plaintiff. The dispute pertaining the transaction was subsequently resolved through the settlement agreement. There was no misrepresentation by the defendants as the plaintiff knew that the first defendant had not finalised the acquisition of the land. Recital of the SPA executed by the plaintiff clearly stated the first defendant was still in the midst of negotiating and finalising the purchase of the land form the landowners. The plaintiff had treated the SPA as a valid contract, capable of being assigned to a third party. There plaintiff was therefore estopped from claiming that there was fraud or fraudulent misrepresentation which could vitiate the SPA (see paras 20, 23 & 66).

(2) The allegation of no stakeholder duty by the plaintiff contradicted cl 1 of the SPA which stated that the deposit was released to the first defendant and the first defendant in turn acknowledged having received the same. Even if the deposit had initially been paid, it would be negated as the plaintiff had agreed to the first defendant receiving the deposit upon execution of the SPA. No legal consequence could be visited upon the second defendant when in effect, the plaintiff had validated the release of the deposit. There can be no breach of stakeholder duty as the deposit was never paid to the second defendant as stakeholder. No evidence was adduced by the plaintiff to support its contention apart from bare statements from the witness box, which statements clashed with the contemporaneous documents (see paras 39–40).

(3) It was not proven that the landowners had refused or were not interested to sell the land to first defendant. On the contrary, negotiations were still ongoing and the first defendant sent a letter to Amanah Raya offering to sell the land. There was no contrary evidence to show that Amanah Raya was not interested in negotiations. The plaintiff had not proven the negotiations with the landowners had irretrievably broken down. Given the number of different landowners, it was perhaps unsurprising that the negotiations were protracted, unwieldy and ultimately did not result in a concluded agreement (see paras 68 & 71).

(4) The testimonies of the said landowners given in the criminal trial should not be received as evidence. The evidence from the previous testimonies in the criminal trial was hearsay and inadmissible. Such testimonies in a different court and in another matter could not be imported into the court in substitute for oral evidence. The plaintiff could not rely on the truth or assertions contained in the said testimonies to prove its case. The said witnesses were not subject to cross-examination by the defendants (see para 73).

(5) Since fraud was not established, the cause of action in conspiracy to defraud against the defendants ought to fail. The plaintiff failed to make out a case against the defendants for conspiracy to defraud and injure. The contemporaneous documents and the plaintiff's conduct showed that it was the plaintiff who backed off from the transaction because it wanted the deposit for other projects. The plaintiff never complained that it was deceived or that fraud had been perpetrated. There was no conspiracy to defraud and injure the plaintiff (see para 84).

(6) The allegation of negligence was not sustainable because the second and third defendants did not owe the plaintiff a duty of case to begin with. The second and third defendants were not solicitors for the plaintiff under the SPA. It was AJC instead. The plaintiff had executed the SPA with open eyes and chose to ignore its own solicitors' advice due to commercial consideration. In the circumstances, the plaintiff could

alleged that the second and third defendant had breached a duty of care and caused loss to the plaintiff due to the transaction (see paras 85 & 89).

(7) It was found that the second and third defendant were not holding the deposit as stakeholder. And that there was no relationship of trustee-beneficiary between the second and the third defendant with the plaintiff. Since no trust or fiduciary relationship existed between the plaintiff with the second and third defendant, there could be no breach of trust or fiduciary duty. It followed that dishonest assistance which was accessory liability of the fourth defendant did not arise at all. In any event, no evidence that the fourth defendant had received the deposit or any part of it (see para 92).

[Bahasa Malaysia summary

Saman ini adalah berkenaan dengan pembelian tanah yang tidak berjaya oleh plaintif di Jalan Klang Lama di bawah Geran 4503, Lot 3910, Mukim Kuala Lumpur berukuran kira-kira 60,321.48 meter ('tanah'). Pemilik tanah yang didaftarkan adalah Low Hock Key dan Low Hock Tuck ('pemilik pertama') yang memiliki 1/2 bahagian yang tidak dibahagikan, Lim Tiong Tian ('pemilik kedua'), Lim Cheong Leong ('pemilik ketiga') dan Hong Kong & Shanghai Bank (M) Trustee Bhd masing-masing memiliki 1/6 bahagian yang tidak dibahagikan. Plaintif telah mengetahui mengenai tanah tersebut daripada defendan ketiga. Pada masa itu, defendan ketiga bertindak sebagai pemilik pertama. Defendan ketiga telah memperkenalkan tanah tersebut kepada PW3. Selepas itu, PW2 berminat untuk membeli tanah tersebut. Pada mulanya, rancangan asal adalah untuk membeli tanah tersebut melalui sebuah syarikat bernama PeakVille Development Sdn Bhd ('PeakVille'). Namun, PeakVille memberitahu defendan kedua melalui surat bahawa pembeli tanah itu bukan PeakVille tetapi merupakan plaintif. Dalam surat tersebut, PeakVille memberitahu defendan kedua bahawa semua pembayaran yang dibuat sebagai deposit perjanjian untuk pembelian tanah akan dianggap sebagai pembayaran yang dilakukan oleh plaintif. Perjanjian jual beli ('SPA') telah dimeterai antara plaintif dan defendan pertama untuk pembelian tanah tersebut ('transaksi'). Dalam pertemuan pada 19 Jun 2012, PW2 memberitahu defendan ketiga bahawa plaintif tidak ingin meneruskan transaksi kerana masalah dengan pemilik-pemilik tanah masih belum dapat diselesaikan. Selepas itu, plaintif menamatkan SPA melalui suratnya bertarikh 19 Julai 2012. Penyelesaian telah dilakukan di antara plaintif dan defendan pertama dalam perjanjian penyelesaian. Berdasarkan perjanjian penyelesaian, plaintif meminta defendan pertama untuk mengembalikan deposit dalam tempoh satu bulan, jika gagal, pihak plaintif akan dibenarkan untuk menarik balik penamatan SPA yang telah dilakukan dan memberikan haknya di bawah SPA kepada pihak ketiga yang tidak berkaitan. Wang tersebut tidak dikembalikan oleh defendan pertama dan SPA dianggap telah berkuatkuasa semula. Defendan pertama menuntut pembayaran sejumlah RM6,093,252 dalam masa tujuh hari

menurut klausa 2.1(i) SPA. Dalam surat bertarikh 24 Ogos 2013 kepada defendan kedua, AJC mengesahkan bahawa penamatan SPA yang terdahulu oleh plaintif kini telah ditarik balik dan bahawa plaintif akan menyerahkan hak dan kepentingannya dalam SPA kepada pihak ketiga yang tidak berkaitan yang dicalonkan olehnya. Pihak ketiga yang dinamakan adalah syarikat bernama Utusan Mewah Sdn Bhd ('pembeli baru'). PW3 mengatakan bahawa tuntutan defendan pertama sebanyak RM6,093,252 mesti dirundingkan dengan pembeli baru. Oleh kerana plaintif gagal membayar sejumlah RM6,093,252, defendan pertama menghentikan SPA melalui notis penamatan bertarikh 21 Oktober 2013 kepada plaintif. Kausa-kausa tindakan plaintif adalah: (a) konspirasi untuk menipu dan merugikan plaintif dengan cara yang tidak sah terhadap semua defendan; (b) pelanggaran tugas fidusiari, pecah amanah dan kecuaian terhadap defendan pertama, kedua dan ketiga; dan (c) bantuan tidak jujur dalam pecah amanah dan kewajipan fidusiari oleh defendan kedua dan ketiga sebagai pemegang amanah konstruktif berbanding dengan defendan keempat. Disebabkan terdapat penipuan seperti yang didakwa oleh pihak plaintif, isu-isu utama yang harus ditentukan adalah: (i) sama ada terdapat misrepresentasi oleh defendan bahawa pemilik tanah telah menandatangani SPA secara terus menerus dengan defendan pertama; dan (ii) adakah defendan kedua menyimpan deposit sebagai pemegang amanah hingga defendan pertama menandatangani SPA secara terus menerus dengan pemilik tanah.

Diputuskan, menolak tuntutan plaintif:

(1) Defendan tidak membuat misrepresentasi kepada plaintif bahawa pemilik tanah telah mengadakan SPA secara terus menerus dengan defendan pertama. Tidak dapat dibuktikan imbangan kebarangkalian bahawa defendan melakukan penipuan terhadap plaintif. Perselisihan mengenai transaksi tersebut kemudian diselesaikan melalui perjanjian penyelesaian. Tidak ada salah pernyataan oleh defendan kerana plaintif mengetahui bahawa defendan pertama belum menyelesaikan pemerolehan tanah tersebut. Recital SPA yang ditandatangani oleh plaintif menyatakan dengan jelas bahawa defendan pertama masih dalam proses perundingan dan penyelesaian pembelian tanah tersebut dari pemilik tanah. Plaintif telah menganggap SPA sebagai kontrak yang sah, yang dapat diserahkan kepada pihak ketiga. Oleh itu, plaintif dihalang untuk mendakwa bahawa terdapat penipuan atau penyalahgunaan maklumat palsu yang boleh membatalkan SPA (lihat perenggan 20, 23 & 66).

(2) Tuduhan bahawa tiada tugas pemegang amanah dipegang oleh plaintif yang bertentangan dengan klausa 1 SPA yang menyatakan bahawa deposit telah dibayar kepada defendan pertama dan defendan pertama telah mengakui telah menerima perkara yang sama. Walaupun deposit pada awalnya telah dibayar, ia akan terbatal kerana plaintif telah

menyetujui bahawa defendan pertama akan menerima deposit setelah SPA ditandatangan. Tidak ada kesan undang-undang yang dapat diguna pakai ke atas defendan kedua apabila plaintif telah mengesahkan pelepasan deposit tersebut. Tidak ada pelanggaran tugas pihak pemegang amanah kerana deposit tidak pernah dibayar kepada defendan kedua sebagai pihak pemegang amanah. Tiada bukti yang dikemukakan oleh plaintif untuk menyokong pertikaiannya selain dari pernyataan kosong dari kandang saksi, yang pernyataannya bertentangan dengan siri dokumen (lihat perenggan 39–40).

(3) Tidak terbukti bahawa pemilik tanah telah menolak atau tidak berminat untuk menjual tanah tersebut kepada defendan pertama. Sebaliknya, rundingan masih berjalan dan defendan pertama mengirim surat kepada Amanah Raya yang menawarkan untuk menjual tanah tersebut. Tidak ada bukti yang bertentangan yang menunjukkan bahawa Amanah Raya tidak berminat untuk berunding. Plaintif tidak membuktikan rundingan dengan pemilik tanah telah gagal. Memandangkan terdapat sejumlah pemilik tanah yang berlainan, ia adalah tidak pelik bahawa rundingan itu berlarutan, tidak beraturan dan akhirnya tidak dapat menghasilkan kesepakatan (lihat perenggan 68 & 71).

(4) Testimoni pemilik-pemilik tanah tersebut yang diberikan dalam perbicaraan jenayah tidak boleh diterima sebagai bukti. Bukti daripada testimoni terdahulu dalam perbicaraan jenayah itu adalah dengar cakap dan tidak boleh diterima pakai. Testimoni itu adalah untuk mahkamah lain dan dalam perkara lain maka tidak dapat diimport ke mahkamah perbicaraan sebagai pengganti bukti lisan. Plaintif tidak boleh bergantung pada kebenaran atau pernyataan yang terdapat dalam keterangan tersebut untuk membuktikan kesnya. Saksi-saksi tersebut tidak menjalani pemeriksaan balas oleh defendan (lihat perenggan 73).

(5) Akibat daripada penipuan tidak dapat dibuktikan, kausa tindakan konspirasi untuk menipu terhadap defendan seharusnya gagal. Plaintif gagal membuktikan kes terhadap defendan kerana bersekongkol untuk menipu dan menyebabkan kerugian. Siri dokumen dan tingkah laku plaintif menunjukkan bahawa pihak plaintif yang keluar dari transaksi kerana mahukan deposit untuk projek yang lain. Plaintif tidak pernah mengadu bahawa ia ditipu atau penipuan telah dilakukan. Tidak ada konspirasi untuk menipu dan merugikan plaintif (lihat perenggan 84).

(6) Tuduhan kecuaian tidak dapat dipertahankan kerana defendan kedua dan ketiga tidak mempunyai tanggunggjawab terhadap plaintif. Defendan kedua dan ketiga bukan peguam untuk plaintif di bawah SPA sebaliknya adalah AJC. Plaintif telah melaksanakan SPA dengan secara sedar dan memilih untuk mengabaikan nasihat peguamnya sendiri dengan membuat pertimbangan secara komersial. Dalam keadaan tersebut, plaintif boleh mendakwa bahawa defendan kedua dan ketiga

telah melanggar kewajiban tanggungjawabnya dan menyebabkan kerugian kepada plaintif disebabkan oleh transaksi tersebut (lihat perenggan 85 & 89).

(7) Didapati bahawa defendan kedua dan ketiga tidak menyimpan deposit sebagai pemegang amanah. Dan bahawa tidak ada hubungan pemegang amanah-benefisiari antara defendan kedua dan ketiga dengan plaintif. Oleh kerana tidak ada hubungan pegang amanah atau fidusiari antara plaintif dengan defendan kedua dan ketiga, maka tidak mungkin ada pecah amanah atau pelanggaran kewajiban fidusiari. Ini berikutan bahawa pertolongan tidak jujur yang merupakan tanggungjawab tambahan defendan keempat tidak ditimbulkan sama sekali. Bagaimanapun, tidak ada bukti bahawa defendan keempat telah menerima deposit atau sebahagian daripadanya (lihat perenggan 92).]

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169, FC (refd)

CIMB Bank Bhd v Veeran a/l Ayasamy [2015] MLJU 993, CA (refd)

CIMB Islamic Bank Berhad v Mohd Saufi Taib [2015] MLJU 1022; [2015]6 CLJ 897, CA (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 3 CLJ 676, CA (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449; [2004]1 CLJ 759, CA (folld)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773, FC (refd)

Hamzah bin Abdul Majid v Mohd Jalani bin Datuk Hj Mohd Sidek & Ors [2014] MLJU 1858, HC (refd)

Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (refd)

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (folld)

Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553; [2019] 3 CLJ 441, FC (refd)

Rosli bin Darus v Mansor @ Harun bin Hj Saad & Anor [2001] 4 MLJ 206, HC (refd)

Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74, PC (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)
Takaka Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (folld)
Veeran a/l Veeriah v PP and another appeal [2018] 1 MLJ 611, CA (folld)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359, CA (refd)

Legislation referred to

Contracts Act 1950 s 17
Evidence Act 1950 ss 40, 41, 42, 43, 92
Solicitors Account Rules 1990

Wong Hin Loong (Lim Siew Ying with him) (Azman, Davidson & Co) for the plaintiff.
Ravi Nekoo (Lee Kian Yun with him) (KY Lee & Partners) for the first and fourth defendants.
Wong Hok Mun (Eng Kar Wei with him) (Azim, Tunku Farik & Wong) for the second and third defendants.

Quay Chew Soon JC:

INTRODUCTION

[1] This trial concerns only the first to fourth defendants (collectively 'the defendants') as the plaintiff's ('P') action against the fifth to 11th defendants had been struck out. After a full trial, I dismissed P's suit against the defendants. These are the grounds of my judgment.

PARTIES

[2] P, which is in the business of property development, wished to acquire the land (defined below) for development purposes. PW2 is a director, major shareholder and the executive chairman of P. PW3 is the general manager of P. PW4 is a partner of the law firm Messrs Arizal Jailani & Co ('AJC'). AJC were the solicitors representing P in the SPA (defined below).

[3] The fourth defendant ('D4') was a director of the first defendant ('D1'). D4 resigned as director and thereafter held the position as general manager of D1. The third defendant ('D3') is the managing partner of the second defendant law firm ('D2'). D2 were the solicitors representing D1 in the SPA.

A BACKGROUND

[4] This suit concerns P's unsuccessful purchase of a land in Old Klang Road held under Geran 4503, Lot 3910, Mukim Kuala Lumpur measuring approximately 60,321.48 metres ('land'). The registered proprietors of the land ('landowners') are:

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(a) Low Hock Key and Low Hock Tuck (as administrators for the estate of Low Moh) ('owner 1') — 1/2 undivided share;

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(b) Lim Tiong Tian ('owner 2') — 1/6 undivided share;

(c) Lim Cheong Leong (as executor) ('owner 3') — 1/6 undivided share; and

(d) Hong Kong & Shanghai Bank (M) Trustee Bhd ('as trustee') — 1/6 undivided share.

D

[5] P had come to know about the land from D3. At that time, D3 was acting for owner 1. D3 had introduced the land to PW3. Thereafter, PW2 was interested in purchasing the land. Initially, the plan was to purchase the land through a company named PeakVille Development Sdn Bhd ('PeakVille'). However by way of a letter dated 22 december 2011, PeakVille informed D2 that the purchaser of the land will not be PeakVille but P instead. In that letter, PeakVille notified D2 that all payments made by PeakVille as earnest deposit towards the purchase of the land will now be regarded as payments made by P.

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[6] A sale and purchase agreement dated 22 December 2011 ('SPA') was entered into between P and D1 in relation to the purchase of the land ('transaction'). Prior to the SPA, PeakVille had made the following payments to D2 as earnest deposit towards the purchase of the land:

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No	Date of letter/payment	Amout of payment
1	27 December 2000	RM1,039,777.20
2	14 February 2011	RM1,583,702.19
3	14 March 2011	RM1,574,087,64
4	22 June 2011	RM981,060.47
5	8 July 2011	RM2,589,313.75
	Sub-Total (First Tranche)	RM7,767,941.25

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[7] Subsequent to the SPA, P made further deposit payments to D2 as follows:

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No	Date of letter/payment	Amout of payment
6	22 December 2011	RM530,000
7	4 January 2012	RM758,182.75

Sub-Total (Second Tranche)	RM1,288,182.75
Grand Total	RM9,056,124.00 ('deposit(s)')

[8] At a meeting on 19 June 2012, PW2 informed D3 that P does not wish to proceed with the transaction as the issues with the landowners have yet to be settled. In an email dated 20 June 2012 to D3, it was said that PW2 has 'suffered enough opportunity costs' as the deposit has been tied up for approximately two years, when 'it could have been invested in alternative projects'. Thereafter, P terminated the SPA vide its letter dated 19 July 2012.

[9] By way of a letter dated 23 July 2013, a settlement was entered into between P and D1 ('settlement agreement'). Pursuant to the settlement agreement, P requested D1 to refund the deposit within one month, failing which P will be allowed to withdraw its earlier termination of the SPA and assign its rights under the SPA to an unrelated third party. In a letter dated 23 August 2013, D1 replied that it will not refund the deposit and therefore the SPA is to be treated as revived. D1 demanded payment of a sum of RM6,093,252 within seven days (pursuant to cl 2.1(i) of the SPA).

[10] In a letter dated 24 August 2013 to D2, AJC confirmed that P's earlier termination of the SPA is now withdrawn. And that P will assign its rights and interests in the SPA to an unrelated third party nominated by it. The nomination of said third party was subsequently confirmed by P vide a letter dated 11 September 2013 to D1. The nominated third party was a company named Utusan Mewah Sdn Bhd ('new purchaser'). In an email dated 26 September 2013 to D3, PW4 said that D1's demand of RM6,093,252 must be negotiated with the new purchaser.

[11] As P failed to pay the sum of RM6,093,252 (in accordance with cl 2.1(i) of the SPA), D1 terminated the SPA vide a notice of termination dated 21 October 2013 to P.

THE PLAINTIFF'S CASE

[12] P's pleaded causes of action are:

(a) as against all the defendants: conspiracy to defraud and injure P by unlawful means;

(b) as against D1, D2 and D3: breach of fiduciary duty, breach of trust and negligence; and

(c) against D4: as a constructive trustee on the ground of dishonest assistance in the breach of trust and fiduciary duty by D2 and D3.

[13] P claims that the transaction, including the SPA, was a sham orchestrated by D3 in collusion with D1, D2 and D4 with the intention of extracting the deposit from P. That D1 (which was under the control of D3 and D4) was the conduit through which D3 and D4 executed the fraudulent plot

[14] P's case is this. Prior to the execution of the SPA, D3 represented to P that D3 would convince the landowners to sell the land to D1. P would thereafter purchase the land from D1. D3 assured P that the landowners had agreed to sell the land to D1. Subsequently, D3 represented that D1 had executed a sale and purchase agreement with the landowners ('back to back SPA').

[15] P avers that the deposit was paid to D2 as stakeholder. It was paid based on representations made by D3 that: (a) the landowners had agreed to sell the land to D1; and (b) D1 had entered into a back to back SPA with the landowners. The term of the stakeholding was that the deposit shall only be released when D1 has entered into a back to back SPA with the landowners.

[16] P alleges that the fraudulent scheme became apparent due to the following: (a) D2 and/or D3 failed to furnish P with a copy of the back to back SPA despite repeated requests; (b) the non-existence of the back to back SPA strikes at the very core of the SPA that was prepared by D2 and/or D3; (c) as the back to back SPA does not exist, then all acts by D3 and the subsequent acts of all the defendants were acts to fraudulently extract and deprive P of the deposit; (d) D1 was never in a position to execute the SPA with P, as D1 was neither the registered nor beneficial owner of the land; and (e) D1 could never complete the terms of conveyance under the SPA as the land was now under the purview and administration of Amanah Raya Bhd ('Amanah Raya').

[17] According to P, it was always understood that D2 would act for P in the SPA with D1. D2 therefore owed P a duty of care although D2 also acted for D1 in the SPA. On 21 December 2011 (a day before the execution of the SPA), D3 insisted that P appoint a separate solicitor. P had no choice then but to appoint AJC as its solicitors.

[18] The statement of claim ('SOC') seeks the following relief:

(a) against D1: (a) a declaration that P has validly terminated the SPA; (b) a refund of the deposit; (c) alternatively, an account and inquiry as to all funds of P received by D1 from D2 which are trust monies and for tracing orders; and (d) an order that D1 pay to P those sums found to be due on the taking of account;

(b) against D2 and D3: (a) compensation for breaches; and (b) an account of all sums belonging to P that were misappropriated by D2 and D3;

(c) against D3: (a) a declaration that the shareholders agreement dated 22 December 2011 ('shareholders agreement') is rescinded; and (b) an order that the shareholdings in Mega Goldhill Development Sdn Bhd ('MegaGoldhill') which had been transferred to D3 under the shareholders agreement is re-registered in the name of PW2.

However, P did not pursue this relief at the trial;

(d) against D4: (a) a declaration that D4 had dishonestly assisted D1, D2 and/or D3 in breach of their fiduciary duties resulting in loss to P; (b) in the alternative, a declaration that D4 had knowingly received payments out of the funds and property of P procured by D1, D2 and/or D3 in breach of their duties owed to P; (c) a declaration that D4 is liable to account to P as constructive trustee; (d) an account and inquiry as to all funds of P received by or paid on account of D4 and for tracing orders; and (e) an order that D4 pay to P such sums found to be due on the taking of account; and

(e) against all the defendants: (a) for the return of the deposit; (b) disclosure of all accounts linked with the defendants; (c) inquiry into all assets acquired by the defendants out of the proceeds of the deposit and an order that these assets be delivered up to P; (d) damages for fraud and conspiracy; and (e) general damages, aggravated and exemplary damages.

FINDINGS OF THE COURT

[19] For there to be fraud as alleged by P, the main issues to be determined are:

(a) whether there was any misrepresentation by the defendants that the landowners have entered into a back to back SPA with D1; and

(b) whether D2 was holding the deposit as stakeholder until D1 had entered into a back to back SPA with the landowners.

[20] My finding is that the defendants did not make any misrepresentation to P that the landowners have entered into a back to back SPA with D1. It was not proven, on a balance of probabilities, that the defendants (or any of them) committed fraud against P. Furthermore, the dispute pertaining to the transaction was subsequently resolved through the settlement agreement.

[21] A conspiracy to defraud is predicated on an underlying act of fraud. It is only if fraud is established against one or more of the defendants that a cause of action in conspiracy to defraud can arise for consideration against the other defendants (see *Hamzah bin Abdul Majid v Mohd Jalani bin Datuk Hj Mohd Sidek & Ors* [2014] MLJU 1858 (HC) at para 25). As fraud was not proven,

P's claim of conspiracy to defraud fails.

[22] It is my finding that D2 was not holding the deposit as stakeholder until D1 had entered into a back to back SPA with the landowners. Thus, there can be no breach of stakeholder duty as the deposit was never paid to D2 as stakeholder. I also find that there was no negligence on the part of D2 and D3 towards P. In my opinion, D2 and D3 do not owe P any duty of care as they did not represent P in the SPA. My reasons are as follows.

NO MISREPRESENTATION BY THE DEFENDANTS

[23] My finding is that there was no misrepresentation by the defendants as P knew that D1 had not finalised the acquisition of the land. Recital (i) of the SPA executed by P clearly states that D1 is still in the midst of negotiating and finalising the purchase of the land from the landowners. Moreover, numerous contemporaneous documents and P's own viva voce evidence also corroborate the same.

[24] There were two parts to the transaction: (a) one being that P was to purchase the land from D1 free of squatters and encumbrances, duly subdivided and converted for development; and (b) the other being that D1 was to purchase the land from the landowners, improve and ready the land as agreed and then deliver the land to P. In my view, D1 cannot be a vehicle of fraud when P chose to enter into the SPA with D1 because D1's function was to 'value-add'. Namely to free the land from squatters and encumbrances and to subdivide and convert the land for development.

Contemporaneous documents and conduct

[25] The SPA is the key document of the transaction. It is evident that P is a seasoned and experienced developer. Both PW2 and PW3 (senior management of P) have years of experience in purchasing and developing land. As such, P would appreciate the legal implications of the SPA which it entered into. P was legally represented in the SPA by AJC. Yet, P agreed to and executed the SPA which terms contradict P's case here. Specifically, recital (i) of the SPA states:

> The Vendor(s) are in the *midst of negotiating and finalizing the purchase* of a piece of land or any part thereof more particularly referred to in Section 1 ...

[26] It follows from the above term that P must have known that D1 (at the time of the SPA) may or may not enter into a back to back SPA with the landowners. The deal with the landowners was still in the balance. Emails of P not only show that PW3 knew of the fact that the back to back SPA with the landowners had not been entered into, but also show that there were internal

issues within P's organisation where PW2 was not informed or updated fully on the progress of the transaction. In an email dated 11 January 2012 to D3, PW3 said:

> ... I told him that Zenith Delight Sdn Bhd is signing the SPA with the Vendor. I *can't now tell him that you are still talking to the Vendor* about the issue. To his understanding, the matter is settled.

[27] The above email indicates that D3 had informed PW3 that D1 had not entered into a back to back SPA with the landowners. There was no hiding of this fact and disclosure is the antithesis of fraud. According to P, it discovered the alleged fraudulent misrepresentation on 27 December 2011 (a mere five days after the execution of the SPA). Strangely however, P then reacted in the following manner:

(a) P continued to pay to D1 a sum of RM758,182.75 on 4 January 2012 as additional earnest deposit towards the purchase of the land; and

(b) P entered into a supplemental ('supplemental agreement') agreement dated 13 March 2012 to correct an erroneous description of the land in the SPA, but without amending any terms of the SPA.

[28] The aforesaid conduct of P (despite knowing that D1 had not entered into a back to back SPA with the landowners) seems odd if there had indeed been a fraudulent misrepresentation. To my mind, the contemporaneous documents and P's conduct make the 'probabilities of P's case' unlikely.

The plaintiff's own viva voce evidence

[29] P's own viva voce evidence confirmed that it understood recital (i) of the SPA. During cross-examination, PW2 admitted he knew that D1's negotiations with the landowners were still ongoing and that the back to back SPA had yet to be signed:

> Q: Alright. Now I'm going to make another suggestion to you, Dato'. I want to see whether you agree with my suggestion or not. I would suggest to you Dato' that it is expressly stated in recital (i) of the SPA that *negotiations between the First Defendant, that is Zenith, with the landowners were still pending.* Would you agree with that?
>
> A: Yes, there were still negotiations, yes.
>
> ...
>
> Q: If they were still negotiating, if the First Defendant and the landowners were still negotiating, it would mean that the *sale of that land by the landowners to the First Defendant may or may not take place.* It's still in the balance. Agreed?
>
> A: Yes.

Q: Alright. Put another way, if it is still pending, it follows that the *landowners had yet to agree to sell the land.* Correct?

A: Yes.

[30] PW3 also made a similar admission in cross-examination:

Q: In the sale and purchase agreement the *Plaintiff knew that the First Defendant was not the landowner.*

A: Yes.

Q: Pursuant to the sale and purchase agreement the Plaintiff knew that the First Defendant needs to negotiate with the landowners and resolve all these other outstanding problems the caveat issue, the subdivision issue, the Plaintiff knew right. Having knowledge of those issues the Plaintiff went on to sign this agreement, agree?

A: Yes.

Q: Ok I'm saying to you if the Plaintiff do not want to sign the sale and purchase dated 22.12.2011 they could have just walked away.

A: Yes.

Q: Do you agree with me?

A: Yes.

Q: So the Plaintiff knew at all times what the Plaintiff is getting into.

A: Yes.

Q: Do you agree with me?

A: Yes.

[31] It would appear that P chose to enter into the SPA on its own freewill because of the value-add offered by D1. P had a choice to purchase the land from the landowners or D1. There was no fraud perpetrated on P when it made a commercial decision to sign the SPA. As business people, P was possibly motivated by the fact that the transaction was a good deal. The structure of the transaction, ie the participation of D1 and its role in improving the land, was accepted by P. P paid the deposit and signed the SPA on its own volition and motivated by its own commercial considerations. This was borne out in PW3's cross-examination:

Q: So, I'm not talking, it is about consideration but I'm referring you to the fact that it says you, the Plaintiff, you are purchasing the said property free from encumbrance but subject to building land for mixed development etc.

A: Yes.

Q: In other words, Clause 1 actually mirrors the recitallah. They, *Zenith has to clean*

it up, ready everything for mixed development then pass it on to you.

A: Yes.

...

Q: So, if I say to you, I suggest to you, *Zenith's participation is exactly that lah. It is to give some value added, to clean up the land ready for mixed development,* I presume you would agree with me.

A: Yes.

Q: Yes. Now, so, I am instructed, so, if you know, don't know, agree, disagree, just say so lah. My instructions are that you as a*Plaintiff had already considered the option of purchasing the land from the owners direct* as per the letters of offer but that is on *an as is where is basis*. But you had taken the option to *buy it from Zenith so that it would be on a ready-to-kick-off development basis*. Would you agree with that?

A: Yes. It's a back-to-back. Yes.

Q: Yes. And that is the reason why you signed the S&P as it is lah, I presume?

A: Yes.

[32] The evidence further show that P was cognizant of the numerous problems associated with the land. There were squatters on the land and caveats lodged against the land. The land had to be converted and subdivided. This perhaps explain why the SPA did not impose any timeline for completion of the negotiations, removal of the squatters and caveats, conversion and subdivision. In an email dated 23 December 2010 to D3, PW3 said:

> There are two things that I'm worried about on the Old Klang Road project is the *conversion and subdivision of land to be done*. We do not have connection in DBKL and Land Office in doing the necessity. We have a project in Selayang was also a converted land. The process of *conversion took about a year and the holding cost is very high*. This is my main concern and little bit hesitate about it. Looking at the plan the frontage facing the highway is vety small. However, I will discuss with my architect and will revert back to you.

[33] In an email dated 8 February 2012 to D3, the sales and marketing manager of P ('sales manager') confirmed being informed by a land surveyor that the land was subject to acquisitions previously and that there was a caveat entered against the land. In the premises, it is apparent that P had performed its own due diligence and was not misled by the defendants.

[34] P accuses D3 of forcing it to purchase the land from D1. In his evidence in chief, PW3 said that D3 had represented that 'the plaintiff can only secure the subject land through the first defendant'. However the evidence suggest that it was not D3 that forced P, but rather it was the advantageous commercial considerations that motivated P to enter into the SPA and to involve D1. P

entered into the SPA knowing that D1 had not secured the land and there was no guarantee of such. It seems to me that this is a case of a business venture gone awry, and not one where a fraud was perpetrated. The contemporaneous evidence, oral testimony as well as P's motive all point towards the fact that P knew that D1 had not acquired the land from the landowner. Therefore, it is my finding that there was no fraudulent misrepresentation by the defendants as alleged by P.

[35] In arriving at my finding, I am guided by the Court of Appeal case of *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449 at p 452; [2004]1 CLJ 759 at p 764 which agreed with the following approach:

> Thus after scrutinising the oral evidence of the two main actors, namely PW1 and DW11 am of the opinion that there are *two conflicting versions* as regards the alleged appointment of PW1. However *when the two versions are compared with the documentary evidence and the conduct of the two parties, I find that PW1's version is more probable*.

[36] Where there is oral evidence which conflict with contemporaneous documentary evidence (as in the present case), I prefer the written record rather than the oral testimony of witnesses. I follow the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234 which said:

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He *purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence*. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the *oral evidence be critically tested against the whole of the other evidence and the circumstances of the case*. Plausibility should never be mistaken for veracity.

(See also the Supreme Court case of *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 at p 37).

[37] Furthermore, P's attempt here to prove that there was a representation by D3 that D1 had acquired the land contravenes the parol evidence rule. I am guided by the Federal Court case of *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 at p 125 which said:

> The contents of this letter therefore *amounts to nothing else than an oral evidence* which the respondents wish to lead in order to prove the second proposition, ie the goods were ordered on behalf of Syahazam, and to support the first proposition, ie

> the goods were not ordered for the respondents, and thus *contradict the sales invoice and delivery note*. We feel that this course of action is not open to the respondents, as it is clear that under s 92 of the Evidence Act, 1950, *oral evidence to contradict, vary, add to or subtract from, the terms of any contract, grant or other disposition of property which has been reduced in writing is not admissible*.

[38] In my opinion, the probabilities of the case point toward the fact that there was no misrepresentation by the defendants that the landowners have entered into a back to back SPA with D1.

NO STAKEHOLDER DUTY

[39] The alleged stakeholder duty is that D2 shall not release the deposit until a back to back SPA was signed between D1 and the landowners. However, such allegation by P contradicts cl 1 of the SPA which states that the deposit was released to D1 and D1 in turn acknowledges having received the same. Even if the deposit had initially been paid subject to the alleged stakeholder duty, this would have been negated as P had subsequently agreed to D1 receiving the deposit upon execution of the SPA. In other words, no legal consequence can be visited upon D2 when in effect, P had validated the release of the deposit.

[40] Furthermore, there can be no breach of stakeholder duty as the deposit was never paid to D2 as stakeholder. No evidence was adduced by P to support its contention of a stakeholder duty apart from bare statements from the witness box, which statements clash with contemporaneous documents. The contemporaneous documents being the SPA, P's own letters of payments and internal emails. All of which leads me to conclude that P had agreed to the deposit being released to D1 as and when it was paid to D2.

Contemporaneous documents and plaintiff's own viva voce evidence

[41] Again, the SPA which is the key document to the transaction states in no uncertain terms that P had agreed that the deposit was to be paid to D1 ('vendor'). Clause 1 of the SPA provides:

> In consideration of the deposit of Ringgit Malaysia Nine Million One Hundred Thirly Nine Thousand Eight Hundred Seventy Eight (RM9,139,878.00) only which is equivalent to 15% of the Purchase Price hereof *paid to the Vendor(s)* upon the execution of this Agreement which the *receipt whereof the Vendor(s) hereby acknowledge)* by way of deposit and parl payment towards the account of the Purchase Price ...

[42] Clause 1 of the SPA corroborates D3's version of events that there was no duty on D2 to hold the deposit as stakeholder pending the signing of a back to back SPA with the landowners. PW2 admitted in cross-examination that P had agreed for the deposit to be paid to D1:

> Q: Second, it's also clear from Clause 1 that you signed the SPA, you signed the SPA on behalf of the Plaintiff and the*Plaintiff had agreed for this deposit to be paid to the First Defendant. Correct?*
>
> A: Yes.

[43] PW3's affidavit, in reply to D1 and D4's affidavit opposing P's discovery application, also confirmed the same:

> Paragraph 13 of D4's affidavit affirmed on 31.1.2017
>
> 13. Perenggan 12 Afidavit Azizi tersebut diakui setakat bahawa Plaintif telah diberitahu oleh Defendan Ke-3 bahawa wang-wang *deposit yang dibayar akan dilepaskan kepada pihak Defendan Pertama sebaik selepas pembayaran oleh Plaintif…*
>
> Paragraph 5 of PW3's affidavitin reply affirmed on 13.2.2017
>
> 5. Perenggan 13 hanya diakui setakat mana ia menyatakan bahawa*Defendan Ke-3 telah memaklumkan kepada Plaintif bahawa jumlah deposit akan dilepaskan kepada Defendan Pertama sebaik selepas bayaran dibuat oleh Plaintif.*

[44] P's own letters conveying payment of the deposits (there were seven payment letters in total) do not mention at all that the deposit was paid to D2 as stakeholder. Further, P's internal memo (prepared by the sales manager) attached in an email dated 28 January 2011 from the sales manager to D3 shows that as early as that time, PW2 knew that the deposits were to be (and indeed were being) paid over to D1. From the evidence, I conclude that P had agreed for the deposit to be paid to D1 and therefore, there was no stakeholder duty on the part of D2 as alleged. According to D1, the deposit was paid to it to enable D1 to engage with the relevant parties to resolve the issues associated with the land (as mentioned earlier).

[45] If P really intended for the deposit to be held by D2 as stakeholder, it would have been easy enough to simply say so in the aforesaid payment letters. That however was not done. In this regard, the Supreme Court case of *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116 is instructive.

[46] In *Toh Theam Hock*, the respondent was the vendor of certain houses. The appellant was the respondent's/vendor's solicitors. The buyers paid 5% of the purchase price to the appellant solicitors. A question arose as to whether the said monies were received by the appellant solicitors as agent or trustee on behalf of the respondent/vendor, in which case the said monies would belong

to the respondent/vendor. The court observed that it is easy to conclude that the appellant solicitor received the said monies on behalf of the respondent/vendor, if there is no agreement to the contrary. However there was an express clause in the agreement which stated that the said monies were paid to the appellant solicitor as stakeholder. The court said at p 118:

> In the present case no doubt the *appellant was retained as solicitor by the respondents* during the material period. *In the absence of any agreement to the contrary it would be easy to conclude that the appellant would have received deposits on behalf of the respondents as their agent or trustee.* But the respondents entered into a contract in the form of a sale and purchase agreement wherein the respondents agreed to abide by the terms *of the agreement with regard to the 5% of the purchase price to be paid to their solicitors as stakeholder* which was to be paid only on the production of a certificate of fitness for occupation of the premises.

[47] Applying *Toh Theam Hock* to the present case, D2 were the solicitors of D1 ('vendor') under the SPA The natural conclusion is that D2 received the deposit on behalf of D1, as D1's agent or trustee. As there is no agreement to the contrary (neither in the payment letters nor the SPA) that the deposit was otherwise paid to D2 as stakeholder.

[48] There are other contemporaneous documents which negate P's contention that D2 had received the deposit as stakeholder.

(a) a letter of offer dated 22 June 2011 from PeakVille ('PeakVille offer letter') states that the deposit (or portion thereof which was paid up to that time) was a non-refundable deposit paid to D2 and to be paid to D1. Page 2 of the PeakVille offer letter under the heading 'Terms of Payment' states:

> (a) a sum of RM5,178,627.50 being *non-refundable deposit* equivalent to 10% of the Purchase Price ('the Earnest Deposit') hereby *paid to your firm and to be paid to Vendors*.

(b) under the settlement agreement, there was an express admission by P that it had paid the deposit to D1. Paragraph 2 thereof states:

> We [ie P] hereby propose that yourselves [ie D1] do remit to us RM9,600,000 being refund of monies *paid by us to you* towards the purchase price of the Property pursuant to the above-captioned Sale and Purchase Agreement within one (1) month from the date of this letter failing which you will allows us to withdraw the said termination and the parties are reverted to the position prior to the said termination as if such termination has not occurred.

(c) in a 'Proposed Settlement Terms and Conditions' dated 30 April 2013 which was signed by PW4 and D3, the payment of the deposit by P to D1 was admitted. Paragraph 2 thereof states:

> The proposed sum of settlement will be RM9,600,000.00 ('Settlement Sum'), which consists of the *actual amount paid by the Purchaser* [ie P] *to the Vendor* [ie D1] *towards the purchase price to date*, together with a compensation sum.

Clause 1 of the spa validated the release of the deposit

[49] Even if there was a stakeholder duty prior to the signing of the SPA, cl 1 of the SPA had validated the release of the deposit to D1. Clause 1 of the SPA clearly states that the deposit was paid to D1 and D1 had in turn acknowledged receipt of it. It is obvious from cl 1 of the SPA that: (a) the deposit was meant for the purchase of the land from D1; and (b) the deposit was meant to be released to D1. As such, even if there was a stakeholder duty on the part of D2 prior to the signing of the SPA, cl 1 of the SPA had released D2 from its stakeholder duty as the deposit was dealt with in a manner which P agreed to. PW2 also admitted in cross-examination that cl 1 of the SPA releases D2's stakeholder duty (if any):

> Q: What I'm trying to say to you, Dato', put simply is this. Even if this 15% deposit was initially paid to the Second Defendant as stakeholder, the *signing of the sale and purchase agreement, especially Clause 1, would have released them from their stakeholding duties, would you agree?*
>
> A: Yes.

[50] In the premises, P's claim that D2 has breached a stakeholder duty is not sustainable as: (a) there was no stakeholder duty, to begin with; and (b) cl 1 of the SPA had in any case validated the release of the deposit to D1.

SETTLEMENT AGREEMENT

[51] The settlement agreement is valid and binding — this was never an issue in the trial. The circumstances leading to, and P's conduct when entering into, the settlement agreement seems inconsistent with P's allegations of fraud. It is to be noted that the settlement agreement was entered into after the SPA had been terminated.

[52] P presented its case in this manner: (a) D3 is the directing mind of the fraud alleged in this suit; and (b) everything that was said to P by D3 was accepted by P without any reservations due to trust flowing, inter alia, from D3's stature as a senior member of the Bar. But P's version of events conflict with its action in entering into the settlement agreement. What more when PW2 and PW3 are seasoned developers with vast knowledge and experience in property development, and were assisted and advised by an experienced solicitor in PW4.

[53] P alleges that: (a) D3 had fraudulently misrepresented to P that D1 had entered into a back to back SPA with the landowners; (b) D2 had breached a stakeholder duty in releasing the deposit before the execution of the back to back SPA; and (c) the whole purpose of these fraudulent acts was to siphon out money from P. On 22 December 2011, P entered into the SPA based on the alleged misrepresentations of D3. Five days later on 27 December 2011, P found out that the land was not secured by D1 and the deposit had been released to D1. In other words, on 27 December 2011 P discovered D3's alleged deceit. It is undisputed that at this point in time, P was represented by AJC. In fact, the evidence show that P had already earlier on instructed AJC to conduct a land search on the land.

[54] Curiously P's conduct after discovering the alleged deceit on 27 December 2011 was this. P continued to make an additional earnest deposit payment of RM758,182.75 on 4 January 2012. Neither P nor its solicitors AJC proposed to change the terms of the supplemental agreement which was signed on 13 March 2012, more than three months after the discovery of the alleged deceit. In its termination letter dated 19 July 2012, P did not raise fraudulent misrepresentation but instead said that the SPA was terminated due to the fact that 'time is of the essence'. In a letter dated 24 October 2012, D2 (on behalf of D1) had disputed the refund of the deposit on the ground that the SPA was unlawfully terminated unilaterally by P. In reply, AJC's letter dated 30 October 2012 stated that the transaction was legally void as D1 and the landowners have no locus standi to sell the land since the land is now under the purview of Amanah Raya. No allegations of fraud or breach of stakeholder duty were raised.

[55] In a letter dated 31 October 2012, D2 (on behalf of D1) said that P knew that D1 was still negotiating the purchase of the land and had yet to sign the back to back SPA with the landowners. In reply, AJC vide its letter dated 29 January 2013 did not dispute knowledge that D1 was still in the midst of negotiating the purchase of the land but instead repeats that the SPA is void due to the land now being under the purview of Amanah Raya. At all material times and up until the settlement agreement was entered into on 23 July 2013, no allegations of fraud or breach of stakeholder duty were ever raised despite P having discovered the purported deceit on 27 December 2011. After numerous exchanges between AJC (on behalf of P) and D2 (on behalf of D1), the settlement agreement was entered into.

[56] The substratum of this whole suit is the deposit and what P essentially wants is to recoup the deposit. The inconsistencies in P's conduct are these. If there were fraudulent misrepresentations and breach of stakeholder duty: (a) why did P not sue the defendants on such causes of action and instead entered into the settlement agreement? (b) why did P's solicitors AJC not raise

them in any of the correspondence with D2 during the settlement negotiations? and (c) why did P substantiate its claim for refund on the premise that the SPA is void due to the Amanah Raya issue? All this points to the probabilities of the case that there was no fraud as alleged by P.

[57] P entered into the settlement agreement with open eyes and on arm's length basis. The alleged fraud was within P's knowledge at that material time. P was represented by independent legal counsel. The settlement agreement in effect subsumed and superseded all previous disputes between P and D1. P's pleaded case did not include any averment warranting the setting aside of the settlement agreement. There was no relief prayed to set aside the settlement agreement. As such, P cannot now revive its complaint when they have agreed to settle the matter.

[58] Initially, P terminated the SPA vide its letter dated 19 July 2012. However pursuant to the settlement agreement, P withdrew its termination of the SPA. Now in the prayers seeking relief, P seeks for an order that the SPA was validly terminated. The relief sought runs counter to the settlement agreement.

[59] It seems to me the reason for P's termination of the SPA was not due to any fraud perpetrated by the defendants. By its own account, the reasons given by P to terminate the SPA was because it felt the deposit is tied up in the transaction for too long and it wanted to utilise the deposit for alternative projects. This is evident from the following.

(a) an email dated 20 June 2012 from PW4 to D3 which states:

> As time is of the essence, Dato Azizi is of the view that he has *suffered enough opportunity costs*, as the funds constituting 15% of the purchase price paid to you so far, have been [tight] up for approximately 2 years, while it *could have been invested in alternative projects*.

(b) a letter dated 19 July 2012 where P notified D2 of its decision to abort the transaction by stating:

> As time is the essence of the contract and in view of the *SPA cannot be completed due to outstanding matters pertaining to the Property which have yet to be resolved by the Vendor, we have decided to abort the transaction*.

(c) a letter dated 27 September 2012 from AJC to D2 where the refund of the deposit was requested and the reason stated was:

> Our client has waited for a very long time for the refund to be made and they will suffer from *loss of opportunity due to the inability to make alternative investments with the funds*. We trust you understand the predicament faced by our client.

(d) a letter dated 22 October 2012 from AJC to D2 where once again the

refund of the deposit was requested and the reason given was:

> ... they [ie P] *require the funds to be utilized for payment of another project land.* Failure to do so by your client may jeopardise the other transaction and damages will be resulted therefrom.

(e) a letter dated 29 January 2013 from AJC to D2 which said that the deposit was needed for another land deal:

> Please liase with the landowners to refund the moneys latest by the 6th February 2013. We sincerely urge you to assist in expediting the refund, as we understand that our *Client really needs the funds to save the Johor Bahru land deal*.

[60] It appears that P wanted to revoke the SPA because the land was not available for sale subsequent to the date of the SPA. In a letter dated 29 January 2013 to D2, AJC said:

> (a) Our client disagrees with the contents of your letter dated 31st October 2012 and maintains that the Sale and Purchase Agreement dated 22nd December 2011, has been revoked, as the subject matter of the transaction, which is the Property, is not available for sale *subsequent to the date of the said agreement*.

[61] According to this letter, the land became unavailable for sale subsequent to the date of the SPA. Implicit therein is an acknowledgement by P that the land was available for sale prior to the date of the SPA. That would be fatal to P's pleaded case of fraudulent misrepresentation. At law, the false representation must take place before the fraud is committed. To succeed in its claim, P must have acted in reliance on the false representation in entering into the SPA. Here P's position that the land became unavailable for sale only subsequent to the date of the SPA would mean that the elements of fraudulent misrepresentation are not met. As there was no misrepresentation prior to the SPA which induced P to enter into the SPA.

[62] In *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359 at p 366, the Court of Appeal explained the elements of fraudulent misrepresentation as follows:

> [13] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case needs to establish that he had *acted in reliance on the fraudulent misrepresentation* and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the respondent had suffered damage.

[63] If indeed there was fraudulent misrepresentation, it will render the SPA voidable. P would be entitled to rescind the SPA and claim damages. This was explained in the Court of Appeal case of *Abdul Razak bin Datuk Abu Samah v*

Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500 at p 507 which said:

> Fraudulent or negligent misrepresentation renders a contract voidable at the instance of the representee. See the Contracts Act 1950 s 19(1). The representee is therefore entitled to apply to a court for a decree of rescission from a court and also to an award of damages.

[64] But P did not rescind the SPA. Instead P assigned the SPA to the new purchaser. Pursuant to the settlement agreement, D1 will allow P to withdraw its earlier termination of the SPA and parties are reverted to the position prior to the said termination, as if such termination had not occurred. Paragraph 3 of the settlement agreement states:

> If the parties were to be reverted to the position prior to the said termination we hereby confirm and with your consent that we shall assign our rights, within six months thereof under the sale and purchase agreement to a proven wholly unrelated third party and the third party shall be proven to be capable of completing the sale and purchase agreement.

[65] AJC subsequently notified D2 by way of a letter dated 24 August 2013 that P:

> will proceed to nominate a third party to assign their rights and interests in the SPA to continue and complete the sale and purchase of the Property, so that our Client can recoup whatever they have paid to your Client from part of the sales proceeds thereof.

[66] In a letter dated 11 September 2013, P informed D1 that it had assigned all its rights and interests in the SPA to the new purchaser. It seems to me that P had treated the SPA as a valid contract, capable of being assigned to a third party. P is therefore estopped from claiming that there was fraud or fraudulent misrepresentation which can vitiate the SPA. P cannot approbate and reprobate.

WHETHER THE LAND COULD NEVER BE ACQUIRED FOR P'S PURPOSES

[67] P's pleaded case is that: (a) the land 'could not or could never by acquired for P's purposes'; (b) D3 knew of this as early as December 2010; and therefore (c) D3 had practiced deceit upon P for the sole purpose of extracting the deposit when D3 knew all along that the transaction was a defunct exercise (see para 15 of the SOC).

[68] However, it was not proven that the landowners had refused or were not interested to sell the land to D1. On the contrary, negotiations were still ongoing as at September 2012. D1 had sent a letter dated 10 September 2012

to Amanah Raya (owner of 1/2 share of the land at the material time) offering to purchase the land. By way of an email dated 18 September 2012, D3 sought a meeting with Amanah Raya to discuss the aforesaid offer. There is no contrary evidence to show that Amanah Raya was not interested in negotiations.

[69] Owner 2 had sent a handwritten note which indicates his interest in selling his share of the land:

> New approach to sell ... Estate
>
> ... After the sub-division we shall apply to Court for the removal of those caveats ... *We are free to enter into SIP agreement with any developer, maybe for a better price*.
>
> *If you agree to this proposal*, please let me know your time & date so that an appointment can be arranged with the land surveyor for furlher details.

[70] Owner 3 said in his email dated 7 December 2011 to D4:

> I am not willing to commit unless it's a done deal. *I might consider* if full payment is made on signing of SPA only (lock stock and barrel) and transfer of title done by purchaser within acceptable time period failing which I still get full payment and ownership of land.

[71] Whilst owner 3 may be driving a hard bargain, it cannot be said that he has refused to sell his share of the land. In the premises, P has not proven that the landowners were not interested in selling the land. P alleges that as negotiations with the landowners had collapsed prior to the signing of the SPA, there was a fraud perpetrated by the defendants. However, P has not proven that negotiations with the landowners had irretrievably broken down. Given the number of different landowners (with their disparate beneficiaries and separate agenda), it is perhaps unsurprising that the negotiations were protracted, unwieldy and ultimately did not result in a concluded agreement.

Whether testimonies of witnesses given in the criminal trial of PP v How Chee Hong vide Criminal Case No 62K-012–03 of 2016 at the Kuala Lumpur Sessions Court ('criminal trial') may be received as evidence in this trial

[72] P sought to rely on the notes of proceedings from the criminal trial ('NOP') to prove that some of the landowners had refused to sell the land since early 2011. I should point out that the NOP was actually tendered by D1 and D4. P in fact questioned the relevancy of the NOP. D1 and D4 explained that the NOP would be referred to only if a witness who had given evidence in the criminal trial, is giving inconsistent evidence in this trial. It was then agreed that the NOP is solely to be used to discredit witnesses on previous inconsistent statements. Contrary to the parties' agreement, P is now relying on the testimonies of owner 1 ('Low Hock Key'), owner 2 ('Lim Tiong Tian') and Lim Dyi Keat as contained in the NOP.

[73] In my opinion, the testimonies of the said landowners given in the criminal trial should not be received as evidence in this trial. Firstly, P failed to call the said landowners to give direct oral testimony in this trial. The evidence from their previous testimonies in the criminal trial is therefore hearsay and inadmissible in this trial. Such testimonies in a different court and in another matter cannot be 'imported' into this court in substitute for oral evidence. P cannot rely on the truth or assertions contained in the said testimonies to prove its case. The said witnesses were not subject to cross-examination by the defendants. In *Rosli bin Darus v Mansor @ Harun bin Hj Saad & Anor* [2001] 4 MLJ 206 at p 224, the High Court cited the following:

> *No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination*. ... As a general rule, *evidence is not legally admissible against a party, who at the time it was given had no opportunity to cross-examine the witness or of rebutting their testimony* by other evidence ... It is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him ...

[74] Secondly, s 43 of the Evidence Act 1950 states that judgments, orders or decrees (other than those mentioned in ss 40, 41 and 42) are irrelevant unless the existence of such judgment, order or decree is a fact in issue. None of the stated exceptions in said ss 40, 41 and 42 are applicable here. My view is that since judgments, orders or decrees are irrelevant, then a fortiori testimonies of witnesses would be irrelevant.

[75] I am of the opinion that statements or testimonies of witnesses in the criminal trial cannot be used as evidence in this trial. I find support in the Court of Appeal case of *Veeran a/l Veeriah v Public Prosecutor and another appeal* [2018] 1 MLJ 611 at p 629 which said:

> There is nothing in the Evidence Act 1950 which allows statements or finding of fact in another case to be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case (*DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22 at p 54). What is rendered relevant by the section is the existence of a judgment but its contents is not. The object behind enacting s 43 according to *Sarkar, Law of Evidence* (16th Ed) Reprint 2008 p 952 appears to be two fold:
>
> (1) to treat every case a class by itself so that thejudgment delivered in one case may not be availed of by parties to another case; and
>
> (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts ...

[76] In any event, the landowners in the criminal trial actually testified that they are willing to sell the land if the price and the terms are right.

Owner 1's (Low Hock Key) evidence

Q: If the price is right you will sell the land?

A: Yes.

Owner 2's (Lim Tiong Tian) evidence

Q: Now, if the term was agreeable then you and other landowners would have sold the land. Correct?

A: I will consider to sell the land.

[77] The burden is on P to prove that there was an intention to deceive. In *CIMB Bank Bhd v Veeran a/l Ayasamy* [2015] MLJU 993 at para 27, the Court of Appeal said:

> The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. *There can never be fraud and/or conspiracy cannot exist, where the intent to deceive does not exist*.

(See s 17 of the Contracts Act 1950).

[78] P must show that: (a) a false representation was made; and (b) the false representation was made either: (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. In *Takaka Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 at p 769, the Federal Court cited the following:

> The term common law *fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations.* The tort of deceit is said to encompass cases where the defendant knowingly or recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.
>
> *Derry v Peek* [1889] UKHL 1; (1889) 14 App Cas 337 illustrates the principle that honesty is a duty of universal obligation, existing independently of contract or fiduciary obligations. In *Derry v Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, Their Lordships set the standard for common law fraud. Lord Herschell said, at p 374, that to succeed, a *plaintiff must prove 'that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'. In other words, there must be a lack of an honest belief in the truth of the representation* ...
>
> To summarise, a *plea offraud at common law will not succeed absent proof of an intention to deceive*.

[79] P bears the burden of proving that the land 'could not or could never be acquired' for its purposes. P might discharge that burden of proof by for

instance calling the landowners to testify. But none of the landowners were called to testify in court. PW1 (one of the landowner's family solicitor) testified that there was no agreement reached with the landowners, but this is not in dispute anyway. However, PW1 admitted in cross-examination that there was the possibility that the landowners had entered into negotiations with D1 which he was not aware of. On a balance of probabilities, I find that P has failed to prove: (a) that the land could not or could never by acquired for P's purposes; and (b) that D3 knew of this and therefore D3 had practiced deceit on P.

[80] P pleaded the following misdeeds and/or acts of deceit: (a) although repeated requests had been made to D2 and/or D3 to furnish P with a copy of the back to back SPA, they failed to do so; (b) the non-existence of the back to back SPA strikes at the very core of the SPA that were prepared by D2 and/or D3; (c) as the back to back SPA does not exist, then all acts by D3 and the subsequent acts of all the defendants in combination were acts that were conceived to unlawfully and fraudulently extract and permanently deprive P of the deposit; (d) even if the back-to-back SPA does exist, D1 was never in a position to execute the SPA with P as at all material times D1 was neither the registered or beneficial owner of the land; and (e) even if the back to back SPA does exist, D1 could never complete the terms of the conveyance in the SPA within any reasonable time as the land was now under the purview and administration of Amanah Raya and with that the objects of the SPA now would be impossible to perform as originally envisaged by P (see para 90 of the SOC).

[81] I find P's complaint that D3 had failed to provide P with a copy of the back to back SPA to be misconceived. The evidence shows the following. D3 did not represent to P that the back to back SPA was already executed and a copy would be given to P. Negotiations were still ongoing. P was seemingly frustrated that the negotiations were taking too long. P sought to abort the transaction since the issues with the landowners have yet to be settled. The reason for P terminating the SPA was because it wanted a refund of the deposit to be used for alternative projects.

[82] The burden of proving conspiracy to defraud is on P. In *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 at p 398, the Court of Appeal said:

> [13] The plaintiffs, who desire the court to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the tort of conspiracy to defraud the plaintiffs, bear the burden of proving their case.

[83] The elements to a conspiracy claim are: (a) a combination or agreement between two or more persons; (b) an intent to injure; (c) pursuant to which

combination or agreement, and with that intention, certain acts were carried out; and (d) resulting loss and damage to the claimant (see the Court of Appeal case of *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797 at p 803; [2016] 3 CLJ 676 at p 683).

[84] As mentioned earlier, since fraud has not been established, therefore the cause of action in conspiracy to defraud against the defendants also ought to fail. Moreover on a balance of probabilities, I find that P had failed to make out a case against the defendants for conspiracy to defraud and injure. The contemporaneous documents and P's conduct show that it was P who backed off from the transaction because it wanted the deposit for other projects. P never complained that it was deceived or that fraud had been perpetrated. There was no conspiracy to defraud and injure P.

NO NEGLIGENCE, NO DUTY OF CARE

[85] It is my finding that the allegation of negligence is not sustainable because D2 and D3 do not owe P a duty of care to begin with. D2 and D3 were not solicitors for P under the SPA. It was AJC instead. This is evident from recital (ix) of the SPA which states:

> The Purchaser(s) has appointed MESSRS ARIZAL JAILANI & CO ... to act for and on their behalf to the sale and purchase herein.

[86] Evidence adduced during the trial shows that P was duly advised by its solicitors AJC prior to the execution of the SPA, but did not follow the advice proffered by them. The cross-examination of PW4 reveals this:

> Q: Alright. So, does it say anywhere in Clause 1 that the stake holding duty has been imposed on the Second Defendant?
>
> A: No.
>
> Q: Does it say in Clause 1 that the Second Defendant ever had a stake holding duty?
>
> A: No.
>
> Q: Actually, Clause 1 says that the deposit had already been released, in fact. Correct?
>
> A: Yes, correct.
>
> Q: Now, did you advise the client, the Plaintiff, insofar as the terms of the S&P are concerned?
>
> A: Yes, I did.
>
> Q: *Did they take your advice?*
>
> A: *No.*
>
> Q: And would you say from a commercial perspective, you are a commercial conveyancing lawyer, that's not abnormal, isn't it? Sometimes, clients take your advice, sometimes, clients do not.

A: Yes.

Q: It's what lawyers would call a commercial decision for them to make.

A: Yes.

Q: Now, if you could look at Bundle A which is the bundle of pleadings, at page 86, paragraph 64, is this the sum total of your advice?

A: Yes.

Q: And when you answered me just now that the advice was not taken, this was the advice that was not taken.

A: Yes.

Q: In that regard, Mr Foo, the Plaintiff signed this S&P with opened eyes, do you agree with me?

A: Yes.

[87] In *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; [2019] 3 CLJ 441, the Federal Court applied the three-fold test of establishing a duty of care in tort namely foreseeability, proximity and public policy. The court said at p 579–582 (MLJ); p 474–477 (CLJ):

> [92] For the establishment of a duty of care in tort, the preferred test in Malaysia is the *three-fold test of foreseeability, proximity and policy considerations*
>
> ...
>
> [93] On the threshold question of factual *foreseeability*, we ask ourselves the following question: was it factually foreseeable that the third and fourth defendants' act or omission might cause the plaintiff to be deprived of her rights to her land? Viewed objectively, we answer that question in the negative ... As solicitors for the fraudster, they are mainly responsible for protecting the interests of their client, the fraudster in first land transaction. The expected scope of the third and fourth defendants' duty only covered the carrying out of the fraudster's instructions.
>
> ...
>
> [94] The next important issue for determination is whether there is sufficient legal *proximity* between the plaintiff and the third and fourth defendants for a duty of care to arise. In assessing whether there was sufficient legal proximity between the parties in a case where the plaintiff only suffered pure economic loss (as in the present case), one of the factors that a court should consider is the principle of voluntary assumption of responsibility (by the defendant) and reliance (by the plaintiff).
>
> ...
>
> [95] It is against the above background, we now turn to the application of the principles of voluntary assumption of responsibility and reliance to the facts of the present case. It is plain for us to see that the only nexus between the plaintiff and the third and fourth defendants is the plaintiffs interest in the land, which does not create legal proximity where the *plaintiff was never the third and fourth defendants'*

> *client* ... The third and fourth defendants had dealt directly with their client the fraudster at all material times. The *third and fourth defendants also never assumed responsibility for the plaintiff*.
>
> ...
>
> [98] Having said that there is no legal proximity between the plaintiff and the third and fourth defendants, we also agree with the submissions of learned counsel for the third and fourth defendants that there are *policy considerations against imposing a duty of care on the third and fourth defendants towards the plaintiff*. Imposing such a duty require solicitors to assume that their clients are acting deceitfully and will put them in a position of potential conflict of interest. That would effectively make solicitors an insurer for all transactions, which would lead to increased costs that are passed on to the clients. Such a duty would apply notjust to solicitors but also to agents for any person in any transaction, including accountants, bankers, insurers, stockbrokers or any other manifestation of an agent.

[88] With *Pushpaleela* in mind, my opinion is that:

(a) firstly, there is no foreseeability as D2 and D3 were not the solicitors acting for P in the SPA. Instead P was represented by AJC. In such a situation, D2 and D3's duties were to protect D1, and not P's interest;

(b) secondly, there is no legal proximity between P with D2 and D3 as P was represented by its own solicitors. D2 and D3 never assumed responsibility for P; and

(c) thirdly, public policy militates against imposing a duty of care on D2 and D3, who were solicitors acting for the counter-party (ie D1), towards P.

[89] P had executed the SPA with open eyes and chose to ignore its own solicitors' advice due to commercial consideration. In the circumstances, P cannot now allege that D2 and D3 have breached a duty of care and caused loss to P due to the transaction.

ALLEGED DISHONEST ASSISTANCE BY FOURTH DEFENDANT

[90] For the purposes of an action for dishonest assistance, the touchstone of liability is dishonesty (see the Privy Council case of *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74). The defendant to a dishonest assistance claim will not be liable unless he has been dishonest in his assistance of a breach of trust. In *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174 at p 209, the Court of Appeal said:

> [55] 'Knowing assistance' is one of two types of third party liabilities under trust law, established in *Barnes v Addy* (1874) LR 9 Ch App 244, and based on the following dictum of Lord Selbourne LC:
>
> (The responsibility of a trustee) may no doubt be extended in equity to others

> who are not properly trustees, if they are found ... *actually participating in any fraudulent conduct of the trustee* to the injury of the *cestui que* trust. But ... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they *assist with knowledge in a dishonest and fraudulent design on the part of the trustees.*
>
> [56] As a general rule, there must be a breach of trust or fiduciary duty by someone other than the defendant, the *defendant must have helped that person in the breach, and the defendant must have a dishonest state of mind.*

[91] In *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 at p 220, the Federal Court explained the test for dishonest assistance as follows:

> [146] In a gist, a new test was introduced by Twinsectra, in that the concept of *subjective dishonesty became a requirement in a breach of trust situation.* Lord Hoffman at p 382 in this case opined:
>
> I do not think that it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles *require more than knowledge of the facts which make the conduct wrongful.* They *require a dishonest state of mind*, that is to say, *consciousness that one is transgressing ordinary standards of honest behaviour*. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.
>
> [147] Lord Hutton at p 384 had added:
>
> Thirdly, there is a standard which*combines an objective test and a subjective test*, and which requires that before there can be a finding of dishonesty it must be established that the *defendant's conduct was dishonest by the ordinary standards of reasonable and honest people* and that *he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'*.

[92] To succeed in its claim for dishonest assistance against D4, P must prove that: (a) D2 and/or D3 were trustees or fiduciaries of P and had committed a breach of trust or fiduciary duty; and (b) D4 had assisted D2 and/or D3 in the breach with a dishonest state of mind, knowing that his conduct was dishonest. However, I have found that D2 and D3 were not holding the deposit as stakeholder. And that there was no relationship of trustee-beneficiary between D2 and D3 with P. Since no trust or fiduciary relationship exist between P with D2 and D3, there can be no breach of trust or fiduciary duty. It follows that dishonest assistance, which is accessory liability of D4 does not arise at all. In any event, I find no evidence that D4 had received the deposit or any part of it.

[93] In para 94(a) of the SOC, P claimed compensation against D1 for breaches of fiduciary duty, duty of fidelity and/or trust. D1 (as vendor) is a counterparty to P (as purchaser) under the SPA. As a counterparty, D1 is entitled to protect its own interest and not have to look after the interest of P. I do not see how D1 can be said to owe any fiduciary duty to act with loyalty in the interest of P.

[94] In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 at p 796, the Federal Court said:

> [54] '*For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another.* This is perhaps the most obvious of the characteristics of the fiduciary office for equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter' ... Thus, the essential element is that there must be some undertaking on the part of the fiduciary to act with loyalty in the interest of the other party. 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'.

[95] P contends that there is an implied retainer between P and D2 and D3 It is true that in the PeakVille offer letter, D2 was appointed to act for PeakVille in the purchase of the land. But that was in the context of an earlier contemplated structure whereby PeakVille would purchase the land directly from the landowners. The vendor named in the PeakVille offer letter was owner 1. That earlier contemplated structure was replaced with the one under the SPA wherein P would purchase the land from D1. Under the SPA, AJC (not D2) was the solicitor for P. P complained that it was forced to appoint AJC one day before the execution of the SPA at the insistence of D3. That however does not detract from the fact that AJC was P's solicitor in relation to the SPA. In fact, AJC did advise P on the SPA, but P did not follow AJC's advice.

[96] In the instant suit, the only scenario which might give rise to a fiduciary relationship is this. D3 was a shareholder in MegaGoldhill together with PW2. D3 and PW2, via MegaGoldhill, had wanted to develop the land into a mixed development of residential and commercial units. Arguably both D3 and PW2 were 'partners' in that regard. Even so, any such fiduciary relationship would be between D3 and PW2, not with P.

[97] P argues that there was a conspiracy because D3 and D4, inter alia, worked in neighbouring offices, had known each other since secondary school,

had a previous working relationship and were generally 'close'. However, this is not evidence of a conspiracy. There is no legal presumption that friends or close associates are co-conspirators.

DEALINGS WITH THE DEPOSIT

[98] In the course of the trial, I allowed P's application to admit D2's office account bank statements and client's account bank statements from December 2010 to February 2012 as evidence. These admitted documents show that part of the deposit had been paid into the office account of D2, which P say constitute a breach of trust. I disagree. As per the SPA, the deposit (including the portion thereof paid into D2's office account) was to be paid to D1. Therefore, P no longer has a claim to the deposit. There can accordingly be no trust in P's favour that could ever be breached. Moreover, for there to be a trust in the first place, P must prove its case that the deposit was paid to D2 as stakeholder and that such stakeholder duty extended post the SPA. That was not proven.

[99] By way of a letter dated 31 December 2012 to D1, D2 confirmed that the entire deposit has been paid in accordance with the instructions of one Alex Lai of the law firm Messrs Lai & Partners ('Alex'). And that D2's professional fees of RM253,000 has been deducted from the deposit. The aforesaid letter referred to a letter of authorization dated 23 December 201 0 from D1 to D2 which instructed D2 to release the deposit in accordance with the instructions of Alex. However, the said letter of authorization was not tendered as evidence at the trial. According to D3, the deposit was paid to various third parties between the period of January 2011 and November 2012. However, both D3 and D4 could not recall who such third parties were. No banking documentary evidence was produced to substantiate such payments. According to D4, Alex was the controller of D1. Alex passed away on 9 January 2013.

[100] P invited me to draw an adverse inference against D3 for not producing evidence to identify the said third parties (to whom some of the deposit was paid). I decline to do so for the following reasons. Firstly, the dispute based on P's pleaded case is whether the deposit ought to be held by D2 as stakeholder pending the signing of the back to back SPA with the landowners. To this, I have found that the deposit was to be released to D1 when paid by P. Secondly, given that the deposit belongs to D1, what right does P have to complain about the release of the deposit. The manner in which D1 utilises the deposit can be of no concern to P. P is bound by its pleadings and these allegations go outside of its pleaded case. In *CIMB Islamic Bank Berhad v Mohd Saufi Taib* [2015] MLJU 1022; [2015]6 CLJ 897 at p 908, the Court of Appeal said:

> [20] Learned counsel for the defendant strenuously contended that the learned judge failed to consider the points relating to the breach of the Solicitors Account Rules 1990 ('the Rules') by the plaintiffs ...
>
> [21] With respect, the submission is misconceived. The points were not pleaded. It is well settled that *in the absence of pleading, evidence, if any, produced by the parties cannot be considered.* It is also equally settled that no party should be permitted to travel beyond its pleading and that all the necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party shall state the essential material facts so that the other party may not be taken by surprise. Further, an*argument on a point of law cannot be entertained without the factual foundation for it existing on the record*.

[101] According to P, the manner in which D2 dealt with the deposit contravenes the Solicitors Account Rules 1990 ('Solicitors Rules'), which provides that trust money should be paid into a client account. However, any contravention of the Solicitors Rules is a matter for disciplinary action by the Bar Council. It is not relevant to the instant suit. In coming to a decision in the present suit, it is not necessary for me to determine whether D3 is in breach of the Solicitors Rules or is guilty of professional misconduct. Even if D2 and D3 contravened the Solicitors Rules, that would not affect the outcome of this case.

[102] P contends that there were no board resolutions by D1 to: (a) release the deposit to Alex; and (b) appoint D2 to act for D1 in the SPA. However, that is an issue of internal management of D1. Even if there is an irregularity in this regard, it can be subsequently ratified by the board of directors of D1.

[103] P argues that D1 has no income or revenue to pay its office rental and did not have money to buy the land. However, it is not in evidence that D1 had been sued for non-payment of rental. And just because D1 does not have money, does not mean it cannot source for funds.

CONCLUSION

[104] For the reasons above, I dismissed P's action against the defendants. I ordered P to pay two sets of costs: (a) a sum of RM50,000 to D1 and D4; and (b) a sum of RM50,000 to D2 and D3.

Plaintiff's action dismissed with costs of RM50,000 paid to first defendant to fourth defendant and RM50,000 to second and third defendant.

Reported by Mohd Kamarul Anwar